A

Low Swee Siong v Tan Siew Siew and other appeals

B

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS W-02(IM)-2666 OF 2010, W-02(IM)-2667 OF 2010, W-02(IM)-2668 OF 2010, W-02(IM)-2669 OF 2010, W-02(IM)-2670 OF 2010 AND W-02(IM)-2674 OF 2010

ZALEHA ZAHARI, AZHAR MA'AH AND CLEMENT SKINNER JJCA

26 JUNE 2012

C

Family Law — Children — Application to bring children out of jurisdiction — Child's best interest and welfare paramount consideration — Whether child old enough to make wishes known — Whether mother's application to take child out of jurisdiction to new environment unrealistic — Whether High Court correct to have fined father for contempt and excluded his participation in hearing

D

The appellant ('the father') in the six appeals herein was the father of a 11-year-old female child while the respondent ('the mother') was the child's mother. In 2003, when the child was about four years old, the mother left

E

Malaysia for England, to later become a permanent resident and a manageress of a restaurant there, leaving the child to be taken care of by the father and his family. In 2006, the marriage between the parties was consensually dissolved and custody of the child was given to the father. In 2008, the mother applied for, and was granted, a variation of the custody order to give her custody of the

F

child with reasonable access to the father ('the 2008 order'). The father did not hand the child over to the mother but continued to take care of her until two years later when, in the Court of Appeal, he withdrew his appeal against the 2008 order and was directed by that court to hand the child over to the mother. Once the mother obtained physical custody of the child, she applied for leave

G

to take the girl out of jurisdiction to the United Kingdom. The father responded to that application within days with another application asking for immediate access to the child claiming the girl was missing from the mother's home. The High Court granted the father's application and ordered the mother to produce the child in court to be interviewed. The mother responded by

H

applying to set aside the order the father had obtained claiming he had misrepresented facts to the court and that the child had not run away but was safe with her. She then applied for the father to surrender to her the child's passport and to have his further access to the child denied until the girl returned to Malaysia during the summer school holidays the following year. All the

I

various applications filed by both parties came up for hearing inter partes before the judge on the same day. However, because of an incident five days prior to the hearing where the child had left the mother and followed the father home, the court on the hearing date held the father to be in contempt of court, excluded his counsel from participating in the hearing and proceeded to hear

all the applications, granting the ones sought by the mother and dismissing the ones sought by the father. The father was directed to produce the child before the court later the same day but he failed to comply. He was again ordered to produce the child and her passport before the court four days later but, again, the father failed to comply causing him to be cited for contempt and to be fined RM20,000 in default five months' jail and to pay a RM400 fine for each day he failed to produce the child and/or the passport. In the instant appeal, the father appealed against all orders made by the High Court during the inter partes hearing in the forced absence of his counsel as well as against the finding of contempt and the fines. During the course of the appeal hearings, the father applied to the High Court to have the 2008 order varied.

Held:

(1) The mother's application to take the child out of jurisdiction was incompatible with the child's best interests and welfare, which was the paramount consideration. Although the High Court was entitled to take into account the reasonable wishes of the mother and her plans and efforts for the child in the UK and the negative impact on her of not being able to take the child to UK, in the final analysis the mother's needs and wishes had to yield to the child's best interests and wishes (see paras 63 & 67).

(2) Although the High Court judge was not able to interview the child, the girl had made her wishes known and the court was fully aware she did not wish to be with her mother, which meant she did not wish to leave Malaysia for the UK. This sentiment was understandable as the child had been under the care and custody of her father since 2003 and had formed a strong attachment for her father and her father's sister who had helped care for her (see para 63).

(3) The child was no longer of tender years and was capable of forming and making known her wishes on matters. In the light of the child's known wishes and views, although the mother's application was not motivated by any selfish desire to exclude the father from the child's life, the mother's application was not realistic (see para 64).

(4) The reality of the situation was that the mother left for the UK back in 2003 content to leave the child with the father and his family. The child had formed a close bond and attachment to him and his sister. She was brought up to the way of life here, went to school and had friends here. To tear the child away from her homeland and the people who had taken care of her for so long and to put her in an un-accustomed new environment was not realistic (see para 65).

(5) The High Court judge had correctly exercised her discretion against allowing the father to be heard at the inter partes hearing of the

applications as his disobedience of the court's orders had impeded the course of justice and made any orders the court might make more difficult to enforce. The father was also properly punished for his contempt in the face of the court (see paras 58 & 73).

[Bahasa Malaysia summary

Perayu ('bapa') dalam enam rayuan adalah bapa kepada anak perempuan berumur 11 tahun manakala responden ('ibu') adalah ibu anak itu. Dalam tahun 2003, apabila anak itu berumur lebih kurang empat tahun, ibu tersebut telah meninggalkan Malaysia untuk ke England, dan kemudian telah menjadi penduduk tetap dan pengurus sebuah restoran di situ, meninggalkan anak itu dalam jagaan bapa itu dan keluarganya. Dalam tahun 2006, perkahwinan antara pihak-pihak telah dibubarkan dengan persetujuan bersama dan jagaan anak itu telah diberikan kepada bapa. Dalam tahun 2008, ibu itu telah memohon untuk, dan diberikan, perubahan perintah jagaan yang memberikan jagaannya ke atas anak itu dengan akses munasabah kepada bapanya ('perintah 2008'). Bapa tersebut tidak menyerahkan anak itu kepada ibunya tetapi terus menjaganya sehingga dua tahun kemudian apabila, di Mahkamah Rayuan, dia telah menarik balik rayuannya terhadap perintah 2008 dan telah diarahkan oleh mahkamah untuk menyerahkan anak itu kepada ibunya. Setelah ibunya memperoleh jagaan fizikal ke atas anak itu, dia telah memohon kebenaran untuk mengambil anak perempuan itu keluar negara ke United Kingdom. Bapa tersebut telah membalas permohonan itu dalam tempoh beberapa hari dengan satu lagi permohonan memohon akses serta merta ke atas anak itu dengan mendakwa anak perempuan itu telah hilang daripada rumah ibu itu. Mahkamah Tinggi telah membenarkan permohonan bapa tersebut dan memerintahkan ibu itu menyerahkan anak itu di mahkamah untuk ditemuduga. Ibu itu membalas dengan memohon diketepikan perintah yang telah diperoleh oleh bapa itu dengan mendakwa dia telah memberi gambaran fakta yang salah kepada mahkamah dan bahawa anak itu tidak melarikan diri tetapi selamat dengannnya. Dia kemudian memohon agar bapa itu menyerahkan pasport anaknya dan agar bapa itu dinafikan untuk berjumpa anaknya sehingga anak perempuan itu pulang ke Malaysia sewaktu cuti sekolah musim panas pada tahun berikutnya. Kesemua permohonan yang difailkan oleh kedua-dua pihak telah didengar inter partes di hadapan hakim pada hari yang sama. Walau bagaimanapun, oleh kerana satu kejadian yang berlaku lima hari sebelum perbicaraan di mana anak itu telah meninggalkan ibunya dan mengikut bapanya pulang ke rumah, mahkamah semasa hari perbicaraan memutuskan bapa itu telah menghina mahkamah, mengecualikan peguamnya daripada terlibat dalam perbicaraan dan terus mendengar semua permohonan, membenarkan yang mana dipohon oleh ibu dan menolak yang mana dipohon oleh bapa itu. Bapa tersebut telah diarahkan untuk menyerahkan anak itu di hadapan mahkamah pada hari sama tetapi dia gagal untuk mematuhi. Dia sekali lagi diperintahkan untuk menyerahkan anak itu dan pasportnya di hadapan mahkamah empat hari kemudian tetapi, sekali lagi, bapa itu telah

gagal untuk mematuhi sehingga menyebabkannya dikatakan menghina mahkamah dan dikenakan denda RM20,000 dan jika gagal lima bulan penjara dan untuk membayar denda RM400 untuk setiap hari yang dia gagal menyerahkan anak itu dan/atau pasportnya. Dalam rayuan ini, bapa itu telah merayu terhadap semua perintah yang dibuat oleh Mahkamah Tinggi sewaktu perbicaraan inter partes yang dilakukan dengan ketiadaan peguamnya yang dipaksa dan juga terhadap penemuan penghinaan dan denda-denda. Sewaktu rayuan perbicaraan dijalankan, bapa tersebut telah memohon kepada Mahkamah Tinggi untuk mengetepikan perintah 2008 itu.

Diputuskan:

(1) Permohonan ibu untuk mengambil anak itu keluar negara tidak setimpal dengan kebajikan dan demi kepentingan anak itu, yang mana adalah pertimbangan yang paling penting. Walaupun Mahkamah Tinggi berhak mengambil kira hasrat munasabah ibu tersebut dan rancangan dan usahanya untuk anak itu di UK dan kesan negatif ke atasnya jika tidak dapat membawa anak itu ke UK, dalam analisis terakhir keperluan dan hasrat ibu terpaksa mengalah demi kepentingan dan hasrat anak itu (lihat perenggan 63 & 67).

(2) Walaupun hakim Mahkamah Tinggi tidak dapat menemuduga anak itu, anak perempuan itu telah menyatakan hasratnya dan mahkamah mengetahui yang dia tidak ingin bersama ibunya, bermaksud dia tidak berhasrat untuk meninggalkan Malaysia untuk ke UK. Sentimen ini boleh difahami kerana anak itu telah berada di bawah jagaan dan kawalan bapanya sejak tahun 2003 dan telah membentuk hubungan erat antara bapanya dan kakak bapanya yang telah membantu untuk menjaganya (lihat perenggan 63).

(3) Anak itu bukan lagi kecil dan mampu membentuk dan menyatakan hasratnya berhubung perkara-perkara tertentu. Berdasarkan hasrat dan pandangan anak itu yang telah diketahui, meskipun permohonan ibu itu tidak dibuat berasaskan hasrat yang mementingkan diri sendiri untuk mengecualikan bapa tersebut daripada hidup nak itu, permohonan ibu itu tidak realistik (lihat perenggan 64).

(4) Situasinya adalah bahawa ibu itu telah pergi ke UK sejak tahun 2003 dengan senang hati meninggalkan anak itu dengan bapa tersebut dan keluarganya. Anak itu telah membentuk hubungan erat dan rapat dengannya dan kakaknya. Dia telah dibesarkan dengan cara hidup di sini, telah bersekolah dan mempunyai kawan-kawan di sini. Untuk memisahkan anak itu dengan negara asalnya dan mereka yang telah menjaganya selama ini dan meletaknya dalam keadaan sekitar yang baru dan asing adalah tidak realistik (lihat perenggan 65).

(5) Hakim Mahkamah Tinggi dengan betul telah menggunakan budi

bicaranya daripada membenarkan bapa tersebut didengar di perbicaraan inter partes untuk permohonan-permohonan itu kerana ketidakpatuhannya terhadap perintah-perintah mahkamah telah menghalang pelaksanaan keadilan dan menyebabkan apa-apa perintah yang mungkin dibuat oleh mahkamah lebih sukar untuk dikuatkuasakan. Bapa tersebut juga telah dihukum sewajarnya kerana menghina mahkamah (lihat perenggan 58 & 73).]

Notes

For a case on application to bring children out of jurisdiction, see 7(2) *Mallal's Digest* (4th Ed, 2011 Reissue) para 3311.

Cases referred to

Hadkinson v Hadkinson [1952] P 285, CA (refd)

Payne v Payne [2001] 2 WLR 1826, CA (refd)

Raja v Van Hoogstraten [2004] EWCA Civ 968, CA (refd)

Shamala a/p Sathiyaseelan v Dr Jeyaganesh a/l C Mogarajah (also known as Muhammad Ridzwan bin Mogarajah) & Anor [2011] 2 MLJ 281; [2011] 1 CLJ 568, FC (refd)

Wee Choo Keong v MBf Holdings Bhd & Anor and another appeal [1993] 2 MLJ 217; [1993] 3 CLJ 210, SC (refd)

Legislation referred to

Law Reform (Marriage and Divorce) Act 1976 s 88

Rules of the High Court 1980 O 52, O 52 r 1A

Appeal from: Suit No S8–33–286 of 2006 (High Court, Kuala Lumpur)

Sulaiman Abdullah (Pushpa Ratnam with him) (Hakem Arabi & Associates) for the appellant.

The respondent not present.

(Jagjit Singh & Co) amicus curie for the child.

Andrew Khoo (Daniel Lo and Delta Samen with him) amicus curie for SUHAKAM.

Zaleha Zahari JCA (delivering judgment of the court):

[1] In this judgment, Tan Siew Siew (the petitioner wife in the High Court and the respondent in all appeals) will be referred to as 'mother'; Low Swee Siong (the petitioner husband in the High Court and the appellant in all appeals) will be referred as 'father' whilst the child of the marriage, Low Bi-Anne (Birth Certificate No 990930–14–6248), will be referred to as 'child'.

[2] These six appeals emanate from the orders made on 9 September 2010

and 13 September 2010 by the learned judicial commissioner of the Family Division Kuala Lumpur High Court in respect of four applications, two at the instance of the mother (encls (110) and (122)) and two at the instance of the father (encls (113) and (119)). By consent of parties all six appeals were heard jointly as they were all inter-related.

[3] It is common ground that on the date of hearing of these appeals the mother, who is resident in England, had discharged her solicitors and had not appointed new solicitors represent her. Despite having been notified of the hearing date of these appeals by the court, as well as the appellant's solicitors, the mother had chosen not to appear nor appoint new solicitors to represent her on the hearing dates. By reason of such absence we have not had the advantage of hearing the mother's views on the issues in these appeals. Two other counsels were present, on a watching brief, for the child, and another, for SUHAKAM. The appellant's counsel had no objection to counsel holding a watching brief to address the court at the hearing of these appeals.

ISSUES FOR DETERMINATION

[4] The three issues for determination in these appeals are as follows: Firstly, whether the learned judicial commissioner had erred in directing counsel acting for the father to leave her chambers and denied him from making submissions on behalf of the father at the hearing of the four applications on 9 September 2010? Secondly, whether the learned judicial commissioner was right in granting an order in terms of the mother's application in encl (110) to take the child out of jurisdiction to the United Kingdom ('UK')? Thirdly, whether the judicial commissioner was right in finding the father guilty of contempt of court on 13 September 2010 and imposing the punishment which she did?

BACKGROUND

[5] The background facts are these. The affidavits filed in support of and in opposition to the applications established the following facts. The mother had left for England in 2003 where she is a permanent resident and works as a manageress in a Chinese restaurant. The marriage was dissolved by consent. By *decree nisi* dated 19 June 2006 ('the 2006 order'), by consent, the custody of the child was given to the father with reasonable access to the mother. The primary carer of the child since 2003 was the father, not the mother.

[6] In 2008 the mother moved an application to vary the 2006 order. The impact of the variation of the order on custody would be that the child would effectively be cut off to a large extent — almost wholly perhaps — from the

parent who had taken care and control of her since the breakdown of the marriage (ie since 2003), out of her homeland into a completely new environment.

[7] A different judicial commissioner heard the mother's application for variation of the 2006 order. On 6 August 2008 the judicial commissioner allowed the application for variation of the order on custody of the child ('the 2008 order'). The mother was given custody of the child with reasonable access to the father. It could be inferred that the judicial commissioner, in varying the 2006 order, was aware that the variation made would not be easy on the child by the need to give the mother time to bond with the child. The father appealed against the 2008 order.

[8] Pending the disposal of the father's appeal against the 2008 order, it is not in issue that the father did not hand over the child to the mother in accordance with the 2008 order. The child continued to be under the care and control of the father despite there being no stay of the 2008 order.

[9] The father's appeal against the 2008 order came up for hearing before the Court of Appeal on 27 July 2010. On this date the father withdrew his appeal. The Court of Appeal according dismissed the appeal and affirmed the 2008 order. Consequently, the father was directed to hand over the child to the mother on 12 August 2010.

[10] On 12 August 2010, both father and child were present at the premises of the Court of Appeal for the purpose of handing over of the child to the mother. It is on record that when the child was before the Court of Appeal on 12 August 2010 she openly showed her hostility to being handed over to her mother and had expressed a strong sentiment to continue to remain under the custody care and control of her father. The child informed the Court of Appeal that her mother had taken care of her for only nine months but her father had done so for ten years. The panel members of the Court of Appeal was also sensitive to the fact that the 2008 order would not be easy on the child. The same sentiment expressed by the judicial commissioner who made the 2008 order was expressed, that the child give her mother a chance. On this date (12 August 2010) the Court of Appeal directed the father to furnish the child's birth certificate and school records to the mother within seven days (ie by 19 August 2010).

[11] The mother then on 13 August 2010 filed encl (110) at the High Court Kuala Lumpur, an application for leave to take the child out of the jurisdiction to UK.

[12] Three days later, on 16 August 2010, the father filed an ex parte

application at the High Court Kuala Lumpur (encl (113)) which application was fixed for hearing on the same date of its filing. The father alleged that the child had been taken away from the premises of the Court of Appeal on 12 August 2010 by force. It was further alleged that he had gone to the mother's address at USJ Heights and was informed by the guardhouse that the owners of that address, were looking for the child as the child had ran away. A court order was required for him to go to the said address to search for the child. The father also applied for an order that he be given immediate access to the child, thereafter, access twice monthly from Saturday at 9am to Sunday at 7pm. In respect of the other prayers in encl (113), his counsel, Ms Chang, requested that they be heard inter partes and undertook to serve the application on the mother.

[13] The judicial commissioner accepted the father's allegations in the affidavit filed in support of encl (113) to be true. The child must be immediately found and her safety guaranteed. To enable her to determine what was in the best interests and welfare of the child, the judicial commissioner was of the view that she should interview the child to ascertain her wishes in accordance with established principles governing the court's power to make an order under s 88 of the Law Reform (Marriage and Divorce) Act 1976. The judicial commissioner then issued the following interim order in respect of encl (113): that the father be given immediate access to the child; thereafter, that he be given access every alternate Saturday from 9am to Sunday at 7pm pending the hearing of encl (113) inter partes on 26 August 2010. The judicial commissioner also issued an order for the mother to bring the child before her to enable her to interview the child ('the interim ex parte order dated 16 August 2010').

[14] Two days later, on 18 August 2010, the mother filed encl (119), also on an ex parte basis, for an order that the interim ex parte order dated 16 August 2010 be set aside, or stayed, as well as consequential orders. Enclosure (119) was also heard on the same date of its filing, 18 August 2010. The mother, in her affidavit filed in support of the encl (119), averred that the child did not run away as alleged by the father, but was safe with her at No 33, Jalan 2/1C, USJ Heights.

[15] Ms YN Foo, appeared for the mother on 18 August 2010. She submitted that the father had failed to make a full disclosure in moving the court to grant the interim ex parte order dated 16 August 2010 in respect of encl (113). She then highlighted the fact that the 2006 order had been varied; that the mother had by the 2008 order been awarded custody of the child; that the father had failed to comply with the 2008 order for the past two years; that the father's appeal against the 2008 order had been withdrawn on 27 July 2010 and that the Court of Appeal had affirmed the 2008 order making the 2008

order a final order. Ms Foo submitted it was in the interest of the child that the 2008 order be complied with without further delay.

[16] The court was then urged to suspend the order granting the father access to the child to enable the mother to continue bonding with the child. Concern was expressed that if the father was to be given such access, the child would not be returned to the mother. In respect of the court's decision to interview the child, Ms Foo submitted that it was too early for the court to do so. According to her, if interviewed at this juncture, the child would in all probability choose to live with the person who had taken care of her these past years, her aunt (ie her father's sister) or her father.

[17] The learned judicial commissioner was persuaded by the submissions of Ms Foo. She granted a stay of the interim ex parte order dated 16 August 2010 pending the inter-partes hearing of encl (113) and also deferred the order for her to interview the child.

[18] Another application was filed by the mother on 18 August 2010 (encl (122)), this time for an order that the father hand over the child's passport as well as for an order that the father's access to the child be suspended until the child return to Malaysia during her school summer holidays in 2011.

[19] Enclosures (110) and (122), were fixed for hearing on the same date as the inter-partes hearing of the encls (113) and (119) on 9 September 2010. Meanwhile affidavits were exchanged by the respective parties in opposing or in reply to the averments made by the other.

[20] The father's version as to what transpired on 4 September 2010 was this. On 4 September 2010 he went with two friends for breakfast in USJ 11. When he was about to go into a shop, the child and her mother came out of the shop. The child wanted to follow him. There was then a tussle between him and the mother. The child started to cry and held on to his hand and shirt. They all then went to the police station. At the police station the child in a loud voice told her mother to take her hands off her and told her to go. The child held on to his hand and went home with him. The child had informed him that she tried to run away twice during the period 12 August 2010–4 September 2010 when she was with her mother.

[21] On 9 September 2010, Ms Kiran Dhaliwal appeared for the mother. She raised a preliminary objection. She submitted that the father was in contempt of court as he had forcibly taken the child from the mother on 4 September 2010 when the mother was with the child at a restaurant. She was of the view the father should not accordingly be heard until he purged his contempt.

[22] After hearing submissions of counsel, this preliminary objection was upheld by the judicial commissioner, that a person in contempt could not be heard until he purged his contempt. The learned judicial commissioner then directed counsel acting for the father to leave her chambers. Before they did so, she directed counsel to inform the father to bring the child to the court at 3.30pm that same day, for the child to be handed to the mother, failing which a warrant of arrest would be issued against the father.

[23] What transpired at 3.30pm on 9 September 2010 would be dealt with subsequently in detail in this judgment when dealing with the father's appeal in respect of the contempt proceedings and punishment imposed against him.

[24] The record shows that after counsel acting on the father left her chamber the learned judicial commissioner then proceeded to hear the four applications fixed for hearing that day (ie encls (110), (113), (119) and (122)) in the absence of the father as well as his counsel, and made the decisions which she did which are the subject of appeals before us.

THE HIGH COURT DECISION

Enclosure (110)

[25] In making the decision which the earlier judicial commissioner did in varying the 2006 custody order that it was to be inferred she had taken into consideration the fact that the mother was resident in London since 2003. She was in a financial position to bring up the child and had purchased a house where she intends to live with the child. The mother's working hours were flexible and she would arrange her shifts around the child's schedule. A part-time domestic help had been engaged to take care of the child while she was at work. The child would be enrolled in Dunraven School near to where they would be living. These facts must have been within the contemplation of the judicial commissioner in varying the 2006 order and in varying the custody, from the father to the mother.

[26] The judicial commissioner in considering encl (110) was of the view on the facts before her that the application to take the child out of Malaysia to the UK was not motivated by a selfish desire to exclude the father from the child's life. According to the judicial commissioner the child would have a very good education in the UK. The resistance to go was because the child did not know what to expect what life would be like there. Given sufficient time and exposure the judicial commissioner was of the opinion that there was a strong possibility that the child would be happy living and schooling there. According to the judicial commissioner, to refuse the mother's application in encl (110) would be to effectively deprive her of the custody of her child and an injustice to her.

[27] The judicial commissioner then took the view that if the father truly loved his child, he should encourage her to try out a new life in the UK. She also was of the opinion that the father's opposition to the mother's application was motivated not by a genuine concern for the child's welfare but by his own selfish need to cling on to the child despite being unable to do so personally as the care of the child was by his sister, Low Swee Toh, and her husband, Vincent Wong (a childless couple). By reason of the mother having family and property in Malaysia, and visits Malaysia regularly, the father's relationship with the child could be arranged when the child returns to Malaysia with the mother, or when he is in the UK.

[28] In the events that had transpired the judicial commissioner made a finding that the father was not a good role model as he had blatantly disregarded court orders and was in contempt of court.

[29] As to what transpired at a restaurant on 4 September 2010 the judicial commissioner accepted the mother's version of events, not the father's. She then ruled that the father had misrepresented and misled the court in moving encl (113) for immediate access to the child on 16 August 2010. She was of the view that it was detrimental to the welfare of the child to be under the continued influence of her father who had taught her to hate her mother.

[30] The judicial commissioner then granted an order-in-terms of the application in encl (110). The mother was granted leave to take the child out of jurisdiction. The father was granted access to the child as follows: The mother has to bring the child back from the UK to Malaysia at her own expense every year during the school summer holidays, or during the Christmas season, for a period of one week. The father was granted supervised access to the child at the mother's residence, or at any other agreed place. The father was also granted supervised access to the child in the UK, at his own expense, not more than four times a year, up to a maximum of not more than one week each time at any agreed place, but not overnight access. Such access was subject to the child's school schedule each access not to commence earlier than 9am and not to exceed 10.30pm. If the father proves to be trustworthy and reliable, such access would be varied and made more liberal, with no supervision.

Enclosure (113)

[31] The judicial commissioner was of the view the father had abused the judicial process. The father's application in encl (113) for access and custody, care and control of the child pending a report from the Department of Social Welfare was dismissed with costs on the ground that the father had obtained the interim order dated 16 August 2010 by misrepresentation of facts by stating that the child had ran away from the mother when in fact she did not do so.

[32] In respect of prayer (2) of encl (113), the judicial commissioner was of the view it was not appropriate to vary the order of custody so soon after the Court of Appeal had affirmed the 2008 order, thus reopening the matter and defeating the court order that had been issued.

Enclosure (119)

[33] The mother's application to set aside the interim order dated 16 August 2010 granting interim access to the father was allowed by the judicial commissioner. The costs of the application was to be borne by the father in view of the mischief caused by him in filing encl (113). The mother would not have filed encl (119) if the father had not filed encl (113).

Enclosure (122)

[34] The mother's application vide encl (122) was allowed. The mother required the child's passport to take her to the UK and to Malaysia for holidays. In view of the mother being allowed to take the child to the UK, the father's access to the child was suspended until the child returned to Malaysia during her next school holidays.

[35] On 20 September 2010 the father filed notice of appeals against all of the orders made by the judicial commissioner on 9 September 2010 in respect encls (110), (113), (119) and (122)) ie Appeal No W-02(IM)-2666 of 2010, W-02(IM)-2667 of 2010 and W-02(IM)-2668 of 2010 respectively.

THE CONTEMPT PROCEEDINGS

[36] The events leading to the institution of contempt proceedings against the father are as follows. When the court resumed proceedings at 3pm on 9 September 2010, Ms KL Chang, counsel for the father, was present, but the child and the father, were absent. The court was informed by Ms Chang that the father had been notified of the orders issued by the court earlier on that morning by way of text message, as well as by letter sent by fax, and that there was no response.

[37] At 3.45pm Ms Chang appealed for the court to grant the father more time to comply with the court's orders issued earlier on that morning ie to surrender the child and the child's passport to the mother. The court acceded to the request. The matter was then adjourned to 13 September 2010 at 11.30am.

[38] On 13 September 2010 at 11.30am the father was present represented

by new counsel, Mr Ravi Nekoo and Ms Pushpa Ratnam of Messrs Hakem Arabi & Associates. The child was not present. The child's passport was not produced.

[39] Mr Ravi informed the court he had filed two applications that morning ie encls (144) and (145), which applications had yet to be processed. Mr Ravi submitted that committal proceedings cannot be commenced against the father as no application for leave to commence committal proceedings had been filed. He was of the view, unless the court invoked O 52 r 1A of the Rules of the High Court 1980 ('the RHC'), contempt in the face of the court, the other rules of O 52 of the RHC had to be complied. He further submitted that a person alleged to be in contempt must be informed of the specific charge against him and be given an opportunity to be heard. As no charge had been framed against the father, and the father had not been accorded an opportunity to defend himself, he urged the court to review the orders made in the absence of the father and his counsel on 9 September 2010 in respect of the four applications fixed for hearing that day.

[40] The judicial commissioner in her judgment stated that when she heard the four applications fixed for hearing on 9 September 2010, after hearing counsel on Ms Kiran's preliminary objection, at that point in time, committal proceedings had not been commenced against the father. She had only ordered the father to hand over the child and the passport at 3.30pm that same day (9 September 2010). Be that as it may, the father was not allowed to be heard at the hearing of the four applications before her by reason of him not having complied with a valid subsisting custody order.

[41] The learned judicial commissioner then gave the father an opportunity to explain on oath to why he did not produce the child and the child's passport as directed by the court that day.

[42] The father stated he did not attend court on 9 September 2010 on the advise his lawyers. As for the non-production of the child, he informed the court that the child cried and refused to come to court because she was afraid. On the last occasion when she attended court on 12 August 2010, after the case, she was bundled into a car by seven or eight persons and taken away from the Court of Appeal premises. As for the child's passport, the father stated that on 9 September 2010 he was at his home in USJ with the child, trying to persuade her to come to court. As a result, he did not have time to go to his mother's home to collect the child's passport.

[43] The record shows that the father was then informed that by reason of the 2008 order, having been affirmed by the Court of Appeal, he must comply

with the 2008 order. That if he continued to keep the child, and not surrender the child to the mother, he would be considered to be in contempt of court.

[44] The learned judicial commissioner took the position that the father's failure to bring the child and her passport to court that day (13 September 2010) constitutes contempt in the face of the court. The learned judicial commissioner then asked the father to show cause why he should not be committed to prison or be fined for contempt of court.

[45] The father gave the same explanation which he had given to the court earlier. That he tried his best to convince and persuade the child to come to court, that she refused because it means that she cannot see him or his family members and repeated the reason why he did not produce the child's passport.

[46] The judicial commissioner then heard submissions of counsel. Ms Kiran submitted that from the father's evidence he only respected the child's wishes and did nothing to bring the child to court. As for the non-production the passport, Ms Kiran submitted that the order was given on 9 September 2010, but it was 13 September 2010 that day. The father had ample time to get the passport had he wanted to but chose not to do so.

[47] In response, Mr Ravi asked for leniency since the father had tried his best to bring the child to the court. He submitted that the father never intended to disobey the court orders. He also stated that it was unfortunate that the court could not interview the child.

[48] The judicial commissioner was not satisfied with the father's explanation. In her judgment she stated he was unable, as a father, to exercise parental supervision, to bring the child to court in compliance with the court order. He made no effort to bring the child's passport to court even though he was ordered to do so. From 9–13 September 2010, he had more than enough time to collect the passport from his mother's house (if indeed the passport was there). The judicial commissioner considered it unbelievable that the father should, at that critical time, be conveniently keeping the passport with his mother when he had no legal right to keep it. The judicial commissioner was convinced that the father was not sincere and had no intention of handing over the child, or the passport, to the mother. That he had taken the law into his own hands when he took the child away on 4 September 2010 totally disregarding the 2008 order which was affirmed by the Court of Appeal on 27 July 2010 and 12 August 2010. The father had also not shown any remorse over what he had done. He had also not tendered an apology to the court. By reason of non-production of the child, the question of the court interviewing the child, if that was what learned counsel for the father was suggesting, was rendered impossible by the father's own acts of contempt of court.

[49] By reason of this being the third opportunity given for the father to comply with the court orders, his failure to do so, and not purging his contempt, the judicial commissioner made a finding that the father was in contempt of court. She then imposed a fine of RM20,000, in default two months' imprisonment upon him. For every day he continued not to hand over the child and/or the passport to the mother, she imposed an additional fine of RM400 a day until he complied with the same. A fine was imposed instead of committing the father to prison with the hope that he would be contrite and remorseful over his actions and do his utmost to hand over the child and the child's passport as soon as possible to the mother. The additional fine of RM400 per day was not intended to be an open-ended penalty to continue indefinitely. Upon the application by the mother, or at the court's own instance, the father can be called upon to pay all outstanding fines, and the punishment of the additional fine of RM400 can be substituted with an immediate and deterrent custodial sentence.

[50] The judicial commissioner subsequently dismissed an oral application by counsel for the father for stay of the punishment imposed for contempt. She was of the view that the father did not have any respect for the law, or the court. The father was fully aware of the fact that he was breaching court orders. The rule of law must be upheld.

[51] The father's appeal against this order is the subject matter of Appeal Nos W-02(IM)-2669 of 2010 and W-02(IM)-2670 of 2010 respectively. The father has also filed a general appeal against all orders made by the judicial commissioner on 9 September 2010 and 13 September 2010 ie Appeal No W-02(IM)-2674 of 2010.

DECISION

[52] On the date of the hearing of these appeals on 22 March 2011 we were informed that the father had paid the fine of RM20,000 and is paying RM400 a day since the issuance of that order. In exercise of our discretion, upon the oral application of the appellant's counsel, we granted a stay of the RM400 per day fine pending the disposal of these appeals.

First Issue: Whether the father should have been heard on 9 September 2010?

[53] The father complains that it was wrong for the judicial commissioner to exclude him from being heard in the morning on 9 September 2010 on the ground of contempt since, at that stage, no leave was granted to bring committal proceedings, and no charge had been framed against him.

[54] We find no merit in this contention for the following reasons. The

decision of the Supreme Court in *Wee Choo Keong v MBf Holdings Bhd & Anor and another appeal* [1993] 2 MLJ 217; [1993] 3 CLJ 210, establishes that a court has a discretion to apply the general rule of law that a person cannot be heard further in the same proceedings for his own benefit unless and until he has purged his contempt. In *Wee Choo Keong* the Supreme Court approved the dicta in *Hadkinson v Hadkinson* [1952] P 285 at p 293 where Denning LJ said that, while it is a strong thing for a court to refuse to hear a party to a cause, and the fact that a party has disobeyed an order of court is not of itself a bar to being heard, the court has a discretion to do so for grave considerations of public policy which the court will exercise if the disobedience is such that, so long as it continues, it impedes the course of justice by making it more difficult for the court to ascertain the truth or to enforce the order which it may make.

[55] In *Shamala a/p Sathiyaseelan v Dr Jeyaganesh a/l C Mogarajah (also known as. Muhammad Ridzwan bin Mogarajah) & Anor* [2011] 2 MLJ 281; [2011] 1 CLJ 568 the Federal Court had to decide as a preliminary issue whether it should proceed to hear five questions of law referred to it by the Court of Appeal despite the fact that the appellant wife there, in breach of an order for joint custody granted to the husband and wife of two children of the marriage, had left Malaysia with the children and continued to remain out of the jurisdiction despite the husband obtaining leave to bring committal proceedings against her and obtaining an order that she should return the children to Malaysia. The Federal Court held that the wife was clearly in breach of the court orders and that until the two children were brought back, the court should decline to proceed with the reference. The reference was then struck out. In other words the court was not prepared to hear the wife in appeal until she purged her contempt.

[56] The decision in *Shamala Sathiyaseelan v Dr Jeyaganesh* is relevant in these proceedings for two other reasons: (a) In that case it was argued that *Wee Choo Keong* was wrongly decided as the Supreme Court had taken a rigid position when saying that a person in contempt could not be heard, but Richard Malanjum CJ (Sabah and Sarawak) held, after a careful reading of the judgment in *Wee Choo Keong* that the Supreme Court had not taken a rigid position as alleged, but had in fact preferred the approach that 'it is a matter of discretion depending on the circumstances of the case whether or not a litigant ought to be heard notwithstanding his contempt'. The learned Chief Judge (Sabah and Sarawak) further held that the decision in *Wee Choo Keong* was in line with the modern formulation of the discretionary test first propounded by Denning LJ in *Hadkinson v Hadkinson* and later refined in cases such as *Raja v Van Hoogstraten* [2004] EWCA Civ 968.

[57] The other reason was, the Federal Court was well aware that at that stage, there was no finding as yet that the wife was 'guilty' of contempt (which

is not unlike the argument of the father here, that he has not been charged and found guilty of contempt yet) but the Federal Court held that per Arifin Zakaria CJ (Malaya) at p 288 (MLJ); p 575 (CLJ), judging from her conduct, since it was apparent that as the wife had no intention of complying with the orders of the court, the court should decline to proceed with the reference.

[58] Reverting to the facts here, we find that the learned judicial commissioner had correctly exercised her discretion against allowing the father to be heard. The father had clearly breached and disobeyed the order of custody dated 6 August 2008 which was affirmed by the Court of Appeal on 27 July 2010, both of which, the father was fully aware of. His disobedience clearly had impeded the course of justice, in that the mother had been directed to bring the child to court so that the judicial commissioner could interview her, which the court was unable to do as the father had taken the child away on 4 September 2010, and by continuing to keep the child, and non-production of the child, made any orders the court may make on 9 September 2010 more difficult to enforce.

[59] We find that the learned judicial commissioner had correctly exercised her discretion in applying the general rule of law stated in *Wee Choo Keong* that a person cannot be heard further in the same proceedings for his own benefit for non compliance of a court order.

[60] With regard to the question whether the judicial commissioner was right in allowing encl (110) in granting leave to take the child out of jurisdiction, it is settled law that in applications such as this, the paramount consideration is, what is in the best interests and welfare of the child?

[61] In arriving at her decision to allow the child to leave for UK the learned judicial commissioner had adopted the approach recommended by the English Court of Appeal in *Payne v Payne* [2001] 2 WLR 1826. In that case it was held that whenever a court is faced with the difficult and vexed question of whether a child should be taken out of the jurisdiction when a marriage breaks up and a situation arises where the child of that marriage, instead of being in the joint custody of both parents is given to the custody of one parent or primary carer who decides to relocate or leave the jurisdiction of the court, the principles to be applied and the questions a court should ask itself in such cases are these:

> A review of the decisions of this court over the course of the last 30 years demonstrates that relocation cases have been consistently decided upon the application of the following two propositions: (a) the welfare of the child is the paramount consideration; and (b) refusing the primary carer's reasonable proposals for the relocation of her family life is likely to impact detrimentally on the welfare of her dependant children. Therefore her application to relocate will be granted unless the Court concludes that it is incompatible with the welfare of the child.

[62] Directing herself along the lines suggested in *Payne v Payne* the learned judicial commissioner found (a) that the mother's application to take the child out of Malaysia was genuine and not motivated by any selfish desire to exclude the father from the child's life, in that, all she desired was to return to the UK where she now works and lives, with her child, whereas the father was selfishly clinging onto the child instead of encouraging the child to go try out a new life in the UK; (b) the mother's application was realistic, in that, she intends to enroll the child in a school close to her home and it should not be too difficult for the child to adjust to living and schooling in the UK where she will receive a good education; (c) allowing the child to leave Malaysia would not have a detrimental impact on the father as he has left the care of the child to his sister and her husband — therefore since the child will return to Malaysia for visits, the father can see her then or when he goes to the UK; (d) the refusal of the mother's application would be a real injustice to her as it would effectively deprive her of the custody of the child which cannot be in the best interest and welfare of the child; (e) the mother will be able to provide a good home and devote sufficient attention and care to the child in UK where the mother has a house, a part-time domestic helper and can arrange her work hours to suit the child's schedule, whereas the father has changed his residence three times since 2008, has not provided evidence of his earnings or employment and the child has changed schools four times in five years; (f) according to a psychologist's report obtained by the mother, the child has not had a stable and loving environment; (g) the father was not a good role model for the child judging from the way he disregards the court orders and it would be detrimental to the welfare of the child if she is under the continued influence of the father who has taught her to hate her mother.

[63] Having given the decision of the learned judicial commissioner our most anxious consideration we are of the considered view that the mother's application was incompatible with the best interest and welfare of the child which is the paramount consideration in any application such as this. In our judgment insufficient attention or regard was given to the wishes of the child. It is unfortunate that the learned judicial commissioner was not able to interview the child, but the child had made her wishes known and the court was fully aware that the child did not wish to be with her mother which must mean, that she did not wish to leave Malaysia for UK. This sentiment was understandable as the child has been under the care and custody of her father since 2003, and by reason thereof, had formed a strong attachment for her father and her father's sister who has helped to care for her.

[64] The child here is no longer of tender years. She is now 11 years old and attending Standard 6. By all accounts she is capable of forming and making known her own wishes on matters, as demonstrated when the Court of Appeal gave her its advice. In the light of the child's known wishes and views, although

the mother's application was not motivated by some selfish desire to exclude the father from the child's life, is the mother's application realistic?

[65] In our judgment it is not for the following reasons. The child has firmly set her mind against her mother and being with her in UK. Although the mother complains that the child's mind has been poisoned towards her, the reality of the situation was that the mother had left for UK way back in 2003, and was content to leave the child with the father and his family to care for her. Despite all the negative things that the mother has said about the father it is an undeniable fact that the child had formed a close bond and attachment to him and his sister. The child is now happily going to school here and her friends are here. She was born here and has been brought up to the way of life here. Is it practical and in her best welfare that the child should be removed from Malaysia? We find not. Taking the child out of Malaysia would mean cutting her off from her homeland and placing her in a new environment and also cutting her off from the parent and family who had taken care of her since the breakdown of the marriage. To tear the child away and put her in a completely new environment to which she is not accustomed to, was not, in these circumstances, realistic. Further, this is not a case where the mother, having left the child with the father, had returned for the child's sake to take the child to UK because the child is being mistreated or the child's welfare is in jeopardy because of the father.

[66] The next question we asked ourselves was, whether a refusal of the mother's application is likely to impact detrimentally on the welfare of the child? In our view it would not. It is said that the child would receive a good education in UK. So too here. As far as housing and personal comfort of the child is concerned, we see very little difference between what the child would enjoy in UK and what she was already enjoying and used to here. With regard to the mother's concern about the father's earnings and employment record and not being a good role model for the child, these matters did not seem to disturb the mother when she left for UK and had agreed to let the father have custody of the child when the marriage was dissolved.

[67] Of course in considering the mother's application, the court was entitled to take into account, as the learned judicial commissioner did, the reasonable wishes of the mother and her plans and efforts for the child in UK, as well as the negative impact on her of not being able to take the child to UK when she is the person to whom custody had recently been granted, but in the final analysis the mother's needs and wishes must yield to the best interest of the child and the child's wishes.

[68] We are aware that an appellate court will not lightly interfere with findings of fact made by a trial court. However we feel that in this case appellate

interference is warranted as the matters we have mentioned were in our view material and relevant to the issues before the court but were not taken into account, especially the wishes of the child.

[69] In our judgment when all relevant matters are taken into consideration, weighing the child's welfare as the paramount consideration, we find the mother's application to be incompatible with the welfare of the child and should have been refused.

[70] On the father's complaint that leave to commence committal proceedings had not been obtained, no charge had been framed, he did not know what he had to show cause against, and no orders with a penal endorsement had been served on him in relation to the orders made on 9 September 2010, and that it was wrong for the judicial commissioner to impose the fine of RM20,000 and a further RM400 a day upon him till he purged his contempt, we are of the following view.

[71] We find no merit in the father's complaint. The father clearly had knowledge that the court had ordered him to return the child and also hand over the child's passport to the mother on 9 September 2010 at 3.30pm that same day because his lawyer had informed him by text message as well by letter. But he obviously chose to ignore the order. When he failed to do so at 3.45pm he was clearly in contempt of court. Then, on the adjourned date, 13 September 2010, the father appeared before the learned judicial commissioner without the child and the child's passport. The record shows that the court had explained to him that because he had withdrawn his appeal against the 2008 order and the Court of Appeal had affirmed that order, it would be wrong for him to continue to keep the child.

[72] In these circumstances we are of the view that the learned judicial commissioner was clearly entitled to proceed to ask him to show cause why he should not be committed to prison or be fined for his contempt. There was no question of the father not knowing what he had to answer to as the learned judicial commissioner had explained what he had done wrong on 13 September 2010 at 11.30am that day.

[73] We accordingly find that the father was properly punished for his contempt in the face of the court on 13 September 2010.

CONCLUSION

[74] In view of the findings that we have arrived at on the issues pertinent in these six appeals, the orders made in respect of the respective appeals before us

are as follows.

Appeal W-02(IM)-2666 of 2010

[75] The appeal against of decision of judicial commissioner in encl (110), is allowed with costs here and below. The orders in respect of prayers (a)–(b) allowing the mother to take the child out of the jurisdiction as well as the orders regarding the father's access is set aside.

Appeal W-02(IM)-2667 of 2010

Enclosure (113)

[76] In respect of the order made in respect of encl (113), in view of our decision in allowing the appeal in respect of the judicial commissioner's decision in encl (110), the father's appeal in respect of the judicial commissioner's decision relating to encl (113) is allowed in part in respect of prayers 1–2.

[77] In the course of hearing of these appeals, we were informed that the father has applied to vary the order for custody made on 6 August 2008 and that this application is now pending hearing before the High Court. Pending the final determination of that application, we grant the father full time access and a stay of the order of custody dated 6 August 2008 of the child. All other orders applied for in encl (113) are dismissed. There will be no order as to costs here and below in respect of this appeal.

Enclosure (119)

[78] In respect of the judicial commissioner's decision in respect of the mother's application in encl (119), ie to set aside the ex parte order in respect of encl (113), in view of our decision in respect of the father's appeal in respect of encl (113), we allow this appeal, and set aside the order of the High Court in respect of encl (119) with no order as to costs here and below.

Appeal No W-02(IM)-2668 of 2010

[79] In respect of the appeal against the judicial commissioner's decision in encl (122), the mother's application for the child's passport and to vary the order of access to the father, consequent upon our decision to allow the father's appeal in W-02(IM)-2666 of 2010 and setting aside the order granting leave to take the child out of jurisdiction, we allow this appeal with costs here and below. Orders 1–2 made by the learned judicial commissioner is accordingly

set aside.

Appeal No W-02(IM)-2669 of 2010

[80] In respect of the appeal against the order of committal and the fine imposed upon the father, we dismiss this appeal. However in view of our order granting the father full time access and stay of the custody order dated 6 August 2008 pending the determination of his application to vary the order dated 6 August 2008, the fine imposed on him of RM400 per day ceases to be payable effective from our decision to stay that order on 22 March 2011.

[81] The appeal against the order of refusal to hear the father on 9 September 2010 was also dismissed.

Appeal No W-02(IM)-2670 of 2010

[82] In respect of this appeal against the application by the father for stay of all orders made by the judicial commissioner on 9 September 2010, we make no order in respect of this appeal.

Appeal No W-02(lM)-2674 of 2010

[83] In respect of this general appeal against all of the six orders made by the judicial commissioner on 9 September 2010 and 13 September 2010, we make no order in respect of this appeal.

[84] Parties are at liberty to apply.

Order accordingly.

Reported by Ashok Kumar